No. 77-1680

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1977

PEOPLE OF THE STATE OF MICHIGAN, PETITIONER

v.

GARY DEFILLIPPO, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND FEDERAL DEFENDERS OF SAN DIEGO, INC., AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

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STATEMENT OF INTEREST OF AMICI CURIAE

California Attorneys for Criminal Justice (CACJ) is a California organization of defense attorneys, public defenders, and interested law students whose common objective is the furtherance of criminal justice.

Federal Defenders of San Diego, Inc., is a private non-profit corporation chartered pursuant to the Criminal Justice Act in the Southern District of California for the purpose of providing competent representation to indigent defendants.

Both organizations are dedicated to the improvement of the administration of justice, the preservation of individual liberties, and to fairness for defendants involved in criminal prosecutions, the ramifications of which can have substantial impact on their lives.

Amici are extremely concerned over the outcome of the case at bar because of their common desire to protect the fundamental constitutional rights of all citizens, including those who may find themselves involved in a criminal prosecution as a defendant. Amici are dedicated to giving meaning to the Fourth Amendment provisions of the United States Constitution proscribing unreasonable searches and seizures, the Fifth Amendment provisions against self-incrimination, and the Sixth Amendment right to a fair trial and effective assistance of counsel. Amici strongly feel that the Michigan statute in question in the case at bar, if permitted to become operative again, will have a substantial adverse impact

on the rights of individuals protected by these constitutional amendments. Amici are concerned over the implications this ordinance has on the ability of the State to intrude upon the private lives of citizens without justification.

Accordingly, amici file this brief in support of the position taken by the respondent that the Michigan statute is unconstitutional.

SUMMARY OF ARGUMENT

Detroit Municipal Code Section 39-1-52.3 provides that a police officer may stop and question an individual if the officer believes that the individual's behavior warrants further investigation for criminal activity. The code section further establishes an affirmative duty on the part of the detainee to identify himself and to produce verifiable documents or other evidence of identification. Lastly, if the detainee is unable to provide (in the police officer's opinion) reasonable evidence of his true identity, the police officer may seize him and transport him to the nearest precinct in order to ascertain his identity.

The Detroit Code section leaves the justification for the initial encounter between the police officer and the individual, and the subsequent scope and duration of that encounter entirely to the discretion of the police officer. The police conduct authorized in this section is contrary to all established precedent. Both Terry and Adams provide that an officer may make a "brief stop" of a suspicious individual in order to determine his identity or to maintain

the status quo momentarily while obtaining more information. The ordinance in question, however, places no such restriction on the duration of the detention. In fact, the ordinance encourages protracted detention by placing an affirmative duty on the detainee not just to identify himself, but to produce documents which the police officer finds to be verifiable and reasonable evidence of the detainee's true identity. Furthermore, the ordinance also encourages not momentary maintainance of the status quo, but actual removal of the detainee from the place of inquiry to the police station. The ordinance also fails to describe the permissible extent of the inquiry by the police officer. How far a police officer may probe in order to satisfy himself that the detainee's true identity has been established is left to the whim of the officer. Furthermore, what information the detainee must provide in order to satisfy the affirmative duty placed upon him by the ordinance is also unaddressed. Since no limitations upon the officer's conduct are provided by the statute, the detainee's Fourth Amendment privilege to be secure in his person, house, papers, and effects, as well as his Fifth Amendment privilege against self-incrimination, is left unprotected.

What the ordinance actually accomplishes is an insulation of law enforcement officers from accountability for their actions. As long as the officer had a subjective belief that the "suspicious" individual had not adequately identified himself, any evidence obtained by this officer during the detention and interrogation of this individual would be immune from the application of the Fourth Amendment exclusionary rule. The

protections of the Fourth Amendment were specifically enacted to prevent undue police power and the tyranny of government. The ordinance in its present form, however, flies in the face of this protection by giving the police the power to stop and interrogate individuals at will. The ordinance, by providing a "good faith" defense to police officers for their actions, simply encourages continued violations of the protections afforded by the constitution.

LEGISLATIVE AUTHORIZATION OF AN ILLEGAL SEIZURE OF A PERSON MANDATES THE APPLICATION OF THE FOURTH AMENDMENT EXCLUSIONARY RULE.

A. The Police Seizure Provision

At the time of the defendant's arrest, the Detroit Municipal Code Section 39-1-52.3 provided:

> "When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity, the police officer may transport him to the nearest precinct in order to ascertain his identity." People v. DeFillippo, 80 Mich. App. 197, 200, 201 (1977). [1]

This provision gives the awesome authority to the police in their numerous contacts

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1 The 1976 Amendment added an express provision to make it a crime for refusal to identify oneself, but the Michigan Court held that refusal to identify oneself was "implicit" in the ordinance as it read at the time of the defendant's arrest." 80 Mich. App. 197, 201 n.1.

and interactions with citizens in a large metropolitan community. The broad, sweeping power of inquiry permitted by the Municipal Code (hereinafter referred to as the ordinance) is not limited as, for example, is the case with immigration officers who are permitted to make inquiry of a person only if they suspect he is an illegal alien, or with a traffic officer who may stop and question someone they suspect of being a drunk driver, but authorizes unrestricted police inquiry for the purpose of "further investigation." The ordinance differs from the procedure outlined in Terry v. Ohio, 392 U.S. 1 (1968), where an officer, before he intrudes on a person's privacy, must be aware of objective, articulable facts permitting the conclusion that criminal activity is afoot. This requirement permits later judicial review of the reasonableness of the intrusion on some basis other than the subjective mental processes of the officer. The ordinance, on the other hand, shifts the focus from this objective requirement to the subjective experience and opinion of the officer. Thus, it amounts to an unwarranted expansion of the doctrine announced in Terry v. Ohio, supra.

Assuming, arguendo, that the initial stop and questioning under the ordinance was constitutionally justified, a second problem arises. The ordinance also establishes an affirmative duty on the person detained, the failure to comply with which is a crime, to identify himself or herself. The scope of the identity process requires oral communications from the detainee, and even more, the detainee must also produce "verifiable documents or other evidence" of identity. The permissible scope of the identification procedure is not defined

by the ordinance. May, for example, the officer require production of, in addition to the name, the date and place of birth of the detainee, his present or former addresses, his telephone number, height, weight, color of eyes, social security number, occupation, names and addresses of relatives, friends or persons in the community who would verify his identity? [2] If the detainee produces a drivers license, what is the process whereby the officer can make verification if the state agency regulating drivers licenses is closed? Does the ordinance permit the detention to last long enough to permit a search through national or local law enforcement computer systems for existing warrants on the detainee? The permissible duration of identification is likewise not set forth by the ordinance. It could literally take hours to complete a record or warrant search and the process of verification of identity could take as long or longer. The balance between individual liberty and government intrusion thereon is clearly tipped in favor of the latter by the authorization given by the ordinance to selective police encounters and detentions. The ordinance might be characterized as a legislatively enacted "mini general warrant" or writ of assistance of persons. The original writ of assistance was directed towards the search for untaxed goods, but the invasion of privacy inherent in the procedure authorized by this ordinance is far more flagrant because it invades the privacy

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[2] Davis v. Mississippi, 394 U.S. 721 (1969), would condemn the use of the ordinance to fingerprint several suspects.

of the person.

Under the ordinance, the decision as to whether the identification requirement has been satisfied rests entirely with the officer in the field, and, as noted, failure to satisfy the officer invokes the penalty provision justifying arrest. Although the ordinance uses euphemistic language providing for the transporting of the detainee to the nearest precinct to ascertain identity, the facts in the instant case show that the respondent's failure to satisfy the officer about his identity resulted in his immediate arrest. (App. 9). A search incident to that arrest was then conducted and marijuana and phencycledine were found on his person. (App. 6-7, 9). Thus, the true purpose of the ordinance was exposed. If its purpose were to merely maintain the status quo to permit further inquiry into identity, the search of the person (more than a pat-down or frisk) was clearly not justified. However, the provision in the ordinance provides for the transportation of the detainee, which is so substantial a deprivation of his liberty as to amount to an arrest.

The dynamics of street encounters with this police field investigation tool cannot be discounted. The citizen, when confronted by the officer in a situation where the officer feels that further justification is necessary, may be stopped, frisked, and questioned. The period of detention is open-ended, and although Terry v. Ohio, supra, and Adams v. Williams, 407 U.S. 143 (1972), permit brief stops, nothing in those opinions permits the prolonged detention allowed here. The very nature of the ordinance provides for protracted detention

and even forced removal to a police station. It fails to describe the permissible extent of the inquiry to be conducted pursuant to its provisions. No guidance is provided as to what the citizen must provide in the way of information. For example, in the American military, soldiers are taught specifically that in the event of capture they are to give their name, rank and service number. There is no such guidance to the prospective detainee. Even if the subject of the inquiry provided detailed information of identity, it may never satisfy the totally subjective evaluation of the detaining officer. Under the rubric of an "identity inquiry" police questioning could wander into areas other than identity and constitute a serious invasion of the person's privacy. The citizen responding to an officer so empowered would be hard-pressed not to provide whatever information was requested, and no provision is made for cautioning against potential violations of the Fifth Amendment privilege against self-incrimination. In some cases, the very production of identity might constitute an offense, i.e., altered or forged identity documents. [3]

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3 The detainee in the instant case represented himself to be a police officer (Sergeant Mash) which could have provided cause for arrest for false impersonation of a public officer (MCLA 750.215). If the pat-down properly revealed the marijuana (App. 6), probable cause for arrest would exist. If probable cause was found based on discovery, the constitutionality of the ordinance may not be in question.

This ordinance empowering police to stop, search, and seize persons runs contrary to the express provisions of the Fourth Amendment. The Fourth Amendment was drafted as a response to the overreaching of governmental officials, albeit it was at that time a foreign government. Early American history affords other examples of government intrusions into the private lives of citizens such as the English impressing American seamen into the British Navy because of their failure to give adequate proof of their identity as Americans. The protection of the Fourth Amendment is directed towards undue police power and the tyranny of government. Our scheme of political democracy dictates an equality between the individual and the state, as well as its minions. The petitioner's claim that a balancing of the interest of the individual against the state recognizes this ordinance as consonant with the underlying principles of the Fourth Amendment is inaccurate. They cannot be so reconciled. The ease with which the Court has approved of police practices and narrowed the exclusionary rule (most recently in Rakas v. Illinois, ___ U.S. ___ (47 U.S. L.W. 4025, 5 December 1978), which attacks the exclusionary rule by greatly constricting the concept of standing) has generated the not-unexpected claim for the judicial confirmation of the most extreme position. On the police-citizen street encounters, the balanced view was expressed by Mr. Justice White in Terry v. Ohio, where in his concurring opinion he stated:

"There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." Terry v. Ohio, 392 U.S. 1, 34 (1968).

B. The Authorized Police Conduct is Contrary to All Established Precedent.

In Terry v. Ohio, supra, the Court permitted under the Fourth Amendment a limited seizure of the person to protect the officer making inquiry after a determination that there was reasonable suspicion that an offense might be in the making. The police officers patted down the suspect and found a loaded revolver. The Court did not reach the issue of whether or not the officers could interrogate the person. The case provided for an expansion of police powers, because the seizure of the person was justified on a basis less than probable cause: reasonable suspicion. The seizure was necessary

to provide adequate safeguards for police officers, and the protection of the officer was balanced against the minor intrusion to the person. In Adams v. Williams, supra, four years later, the court again permitted a minor intrusion, a protective frisk, to allow a police officer to remove a weapon from the waistband of a suspect. The Adams case did not involve an interrogation, but rather the results of the limited seizure based upon reasonable suspicion. Thereafter the officer effectuated an arrest and conducted a search incidental thereto. The court restated the general rule:

> "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." 407 U.S. 143, 146.

Although the petitioner emphasizes the language that permits the determination of identity (Petitioner's Brief 25 n.10), they fail to concentrate on the critical language that refers to a "brief stop". That language is not limited to the subjective assessment of the officer or the need for further investigation but refers to a "suspicious individual," which necessitates an articulable objective basis subject to later court review that the inquiry was in fact reasonable. The co-equal language that would permit the brief stop to maintain the status quo, momentarily, again emphasizes that the duration of the contact is to be brief, which is clearly inconsistent with the conduct authorized under the Detroit

ordinance.

The petitioner's reliance on Almeida-Sanchez v. United States, 413 U.S. 266 (1973), is inappropriate. That case dealt with a statute, 8 U.S.C. Section 1357(a)(3), which permitted the Immigration Service to conduct warrantless searches of automobiles within a reasonable distance of any external boundary of the United States. The Court in Almeida, supra, held that search of the automobile must be based upon probable cause to be consistent with the Fourth Amendment. The statute was part of an administrative framework to prevent illegal immigration, but the Detroit Ordinance is inextricably bound up with police investigative procedure of all offenses. Further, the Detroit Ordinance makes failure to cooperate with the police a criminal offense, which, instead of distinguishing it from Fourth Amendment scrutiny, increases it. A case of more proximate application would be United States v. Brignoni-Ponce, 422 U.S. 873 (1975). Under a federal statutory provision immigration officers were authorized without a warrant "to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States." 8 U.S.C. 1357(a)(1). The Government contended this power of inquiry permitted a stop of any automobile without any basis whatsoever, but the Court, not requiring these federal law enforcement officers to have probable cause to make a stop (which would be required for a search), did require that there be a "reasonable suspicion" to stop a car in the border area. Apparent Mexican ancestry was not enough. Brignoni-Ponce would undermine

that portion of the ordinance that would permit anything less than reasonable suspicion to justify a stop. [4]

Nothing in any of the existing cases of this Court permits a stop on less than reasonable suspicion, leaves the nature and duration of the stop up to the unfettered control of the police officer, or permits police officers to take into custody those who failed to provide adequate identification.

C. The Unlawful Seizure and Subsequent Search Were Not Sanitized by the Officers' "Good Faith."

The Executive Branch cannot promulgate regulations justifying searches inconsistent with the Fourth Amendment (i.e., Almeida-Sanchez v. United States, supra), nor may an executive officer issue a search warrant which would justify the subsequent conduct of the police officers in conducting a search only unless the executive officer does in fact have the authority to issue it. (Coolidge v. New Hampshire, 403 U.S. 443 (1971)). In Whitely v. Warden, 401 U.S. 560 (1971), this Court

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4 The Court's subsequent decision in United States v. Martinez-Fuerte, 428 U.S. 543 (1976), dealt with the situation of a fixed permanent checkpoint for aliens which would permit a brief intrusion in the border area where adequate notice had been well established. That case would appear inapplicable because the ordinance permits wide-ranging stops for any investigative purpose anywhere, at any time, in the municipal geographical limits.

through the opinion written by Mr. Justice Harlan rejected the arguments that the reliance of officers on another officer's radio bulletin was sufficient to insulate a challenge to an otherwise illegal arrest. 401 U.S. 568. If magistrates or other judicial officers issued warrants in proper form to law enforcement officers, the fact that those officers executed those warrants in good faith will not preclude an attack on the judicially authorized searches. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). If the Fourth Amendment exclusionary rule is not insulated by the officer's reliance upon the actions of the Executive or Judiciary, a special exception may not be created for legislative fiats. The magistrate issuing a search warrant often acts with dispatch to meet immediate needs of law enforcement officers desirous of a quick seizure. Often time for careful deliberation is limited. The legislature, especially when dealing with an ordinance directed toward expanding police powers and permitting the detention and seizure of persons, has the advantage of the slow deliberative process in the promulgation of such laws as well as the thoughtful input of experienced legal counsel. The acts of a legislature should be held to high standards in properly respecting the implications of the Fourth Amendment. Adoption of the position espoused by the petitioner encourages the enactment of overly broad legislative standards which insulate the police from Fourth Amendment attacks on their conduct. For example, the legislative body might adopt a rule; which provided: "All searches and

seizures conducted by law enforcement officers within the scope of their duty are lawful." The officer in reliance on this legislative grant of authority could not be criticized nor would any Fourth Amendment remedy be available to a defendant in a criminal proceeding. Such a rule would sanction and encourage improper conduct on both the part of legislative bodies as well as law enforcement authorities.

In Henry v. United States, 361 U.S. 98, 102 (1959), this Court stated: "Good faith on the part of the arresting officers is not enough." In Beck v. Ohio, 379 U.S. 89,97 (1964), Mr. Justice Stewart speaking for the court held:

> "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."

D. The Erosion of the Exclusionary Rule Also Eliminates Any Deterrence of Police Invasions of Privacy Rights

In Stone v. Powell, 428 U.S. 465 (1976), the majority opinion refers to two purposes for the exclusionary rule. The primary purpose for the exclusionary rule is the deterrence of police conduct that violates Fourth Amendment rights. 428 U.S. 465, 486. The Court refers to the "imperative of judicial integrity," but indicates that this purpose of the rule is of limited application in light of the Court's decisions requiring an objection, limiting standing, restricting the rule to certain proceedings (not the Grand Jury), and permitting its use in impeachment of a defendant who testifies. 428 U.S. 465, 485-486. Because of the successful appeals of law enforcement agencies, the salutary protection of privacy has been significantly diluted.

1. Without the Exclusionary Rule, the Fourth Amendment is Meaningless.

The protection afforded by the Fourth Amendment has a restraint upon government and its agents. The right of privacy or security vests in the individual, but there must be some means to afford the protection. If the government itself seeks to violate the rules, who will there be to guarantee the privacy or security afforded by the Fourth Amendment to the individual? The State has only those powers afforded to it by its constitution, and there must be some procedure for enforcing that right.

Criminal cases are one of the most common confrontations between the State and the individual, and it is in those reoccurring proceedings that the State must be subjugated to the interests of the individual as defined by the Constitution. In its enforcement proceedings of its criminal law, those constitutional limitations must apply. Without a sanction on officers who violate the constitution, the Fourth Amendment is a paper-tiger exercise of rhetorical oratory. This was best said in Weeks v. United States, 233 U.S. 383, 393 (1914), where the Court then stated:

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

The early statements of the purpose of the rule rely heavily on the fundamental principles upon which the Fourth Amendment was founded. There was no balancing or weighing of process.

Chief Justice Taft in Olmstead v. United States, 277 U.S. 438, 462 (1928), commented:

> "The striking outcome of the Weeks case and those which followed it was the sweeping

> declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in Court, really forbade its introduction, if obtained by government officers through a violation of that amendment."

In Mapp v. Ohio, 367 U.S. 643 (1961), which outlines the history and development of the Rule, the Court echoed, through the opinion of former Attorney General Mr. Justice Tom Clark, the continuing sentiment that the Fourth Amendment was self-executing:

> "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as it used against the Federal Government. Were it otherwise, then just as without the Weeks rule the assurance against unreasonable federal searches and seizures would be 'a form of words,' valueless and undeserving of mention and a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence

as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty'." 367 U.S. 643, 655.

Given these pronouncements on the fundamental character of our constitutional charter, it would seem anomolous that the City of Detroit, through an ordinance, could effectively overrule the Fourth Amendment protections of all who live or travel inside its boundaries by vacating the application of the exclusionary rule for its police officers.

2. The Imperative of Judicial Integrity was Designed to Insulate the Judiciary from Participation in Violations of the Fourth Amendment.

In Weeks, the United States Marshal, an officer of the court, improperly secured evidence by an unlawful search and seizure, and the Court held the evidence inadmissible. The Court held:

> "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution intended for the protection of the people against such unauthorized action." 232 U.S. 383, 894.

The same purpose was acknowledged in Mapp v. Ohio, 367 U.S. 643, 648-649,

659-660 (1961). The phrase "the imperative of judicial integrity" was fashioned in Elkins v. United States, 364 U.S. 206, 222 (1960), but it had earlier origins. The philosophical foundation of this principle was based on law as well as morality. If violations of the Fourth Amendment were tolerated by the Court, there would be a participation or cooperation by the Court in the violations. The continued reoccurrence of violations and the continual acceptance by the Court would further give rise that judicial officers, taking an oath to support the Constitution of the United States, had not complied with their oaths. The fact that exceptions exist today inconsistent with earlier precedent to justify other competing values, does not lessen the logic that there is a tolerance of an evil. Pragmatically, it may be said, in support of those opinions which have sorely narrowed the exclusionary rule, that it is the court's determination that the lesser evil is selected.

In the context of this case, the Court would judicially sanction the abolition of the exclusionary rule by permitting any legislative body to provide the necessary insulation to preclude its application. That action would only encourage continued violations of the Constitution and would involve the judiciary in fashioning an imprimatur for such conduct. Such a conclusion would not only abrogate the meaning and purpose of the Fourth Amendment as a restraint on police activity, but it would viscerate the role of the judiciary to fairly scrutinize police conduct and to determine

whether or not it was "reasonable" under all the circumstances. Now, the court has been offered an "easy out" through a legislative body to insulate police officers from the strictures of the Fourth Amendment.

3. The Right of Privacy of Citizens is Protected by the Fourth Amendment's Exclusionary Rule.

In Mapp, this Court recognized "the exclusion doctrine (as) an essential part of the right of privacy." 367 U.S. 643, 656. In Katz v. United States, 389 U.S. 347 (1967), the Court reasoned that the "Fourth Amendment protects people, not places" (389 U.S. 347, 351) and noted that the Fourth Amendment protects individual privacy against certain kinds of government intrusions. Recently, there is confusion and ambiguity as to whether or not the Fourth Amendment is directed at the protection of places or things or the integrity of the person. Earlier cases required that for standing to assert the Fourth Amendment exclusionary rule there had to be a technical trespass on property. This rule fell under the Katz doctrine which eliminated the artificial trespass requirement in favor of a reasonable expectation of privacy of an individual. This month, in Rakas v. Illinois, ___ U.S. ___ (47 U.S.L.W. 4025) 5 December 1978), the Court denied standing to passengers to complain about a search of an automobile. Even with this narrowing of the concept of standing, it has no application in this case which deals with the police intrusion of a citizen's person and liberty. Under United States v. Chadwick, 433 U.S.

1 (1977), before a locked suitcase once detained may be examined, a search warrant must be obtained. The intervention of the judicial officer is available to protect property, but in the instant case, there was no antecedent judicial review provided. The individual could be stopped, questioned, arrested, and taken into custody, transported to a police station, and detained until the "true identity" was discovered. The only judicial intervention might be by writ of habeas corpus, assuming that the person so detained would have access to counsel during the period of detention. The grossest invasions of personal liberty are threatened by the Detroit Ordinance.

4. Proof to the Public that Government Officials Comply with the Fourth Amendment is Necessarily Required by the Clear Cut Application of the Fourth Amendment's Exclusionary Rule.

Although the public wants effective enforcement of the criminal law, the public also wants the rights of the individual and his or her property respected. Several well-publicized cases of law enforcement officers engaged in unwarranted searches have aroused public indignation. These officers of the Government are subject to the law. The failure of our system of justice to bring to account those who violate both the Constitution and the rights of privacy of others may have awesome consequences. The courts must strive to ensure that the agents of governments are made responsible to the extent that the public is fully aware of it. The

best articulation of that basis was made by Mr. Justice Brandeis in his dissenting opinion in Olmstead v. United States, 277 U.S. 438, 485 (1928):

> "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

If police officers with legislative authority could conduct any type of search and not be held accountable because of their "good faith" reliance upon an unconstitutional and defective ordinance, respect by the citizenry for the courts would reasonably be impossible to obtain.

5. The Fourth Amendment Exclusionary Rule is Designed to Deter Present and Future Police Misconduct.

This oftsighted basis for the exclusionary rule is the limitation of police misconduct to control law enforcement excesses in pursuit of desired goals. The competing interests of the protection of the individual (a consideration of the scope of the intrusion) is balanced against the needs of law enforcement. Field interrogation may be a needed asset in the arsenal of law enforcement, but uncontrolled, unsupervised, and unlimited, cannot be tolerated. Terry v. Ohio provided essential protection for the police officer and allows limited seizures justified by reasonable suspicion, but without probable cause or a warrant. The Detroit Ordinance applied to the facts of this case demonstrates the variance from Terry v. Ohio. The Ordinance is a "catch-all" to arrest uncooperative persons not even suspected of an offense. If the Detroit Ordinance is sustained to provide a "good faith" defense to law enforcement officers, every jurisdiction will adopt a similar ordinance for the clear purpose of insulating officers from accountability of their actions in criminal cases.[5]

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[5] Good faith reliance or legislative authorizations to act is sometimes relevant for purposes of retroactivity analysis where new constitutional principles are announced. United States v. Peltier,

Although the Second Circuit held

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422 U.S. 531 (1975). No new rule is involved as this case is controlled by Terry v. Ohio. It is also relevant in civil suits. See, e.g., Williams v. Gould, 486 F.2d 547 (9th Cir. 1973) (Suit under 42 U.S.C. 1983 (Federal Civil Rights Act) for warrantless invasion by police officer of apartment; held that good faith of officer is an available defense.) In reversing the trial court, the circuit court held:

> We comment on the merits of the defense in only one respect. Because the defense rests on good faith and reasonable belief, Officer Gould need not, in order to establish the defense, prevail on the legal position that a warrant is not required to enter a home to arrest a felon. Whether a warrant is required in such a situation is an open constitutional issue. It divides the Supreme Court. Williams v. Gould, supra, at 548. See also Coolidge v. New Hampshire, 403 U.S. 443, 476-82 (1971). Either view as to its ultimate resolution might be entertained reasonable and in good faith. Coolidge v. New Hampshire, supra, at 548.

> that federal police officers and agents have no immunity from suits charging violation of constitutional rights. (Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1347 (2d Cir. 1972)) the officer need not prove probable cause to establish a defense. He must only show that he acted in good faith and with a reasonable belief in the validity of the arrest and search. Id. at 1348. Cf., Abramson v. Mitchell, 459 F.2d 955, 957 (8th Cir. 1972), (good faith reliance on court order to intercept wire or oral communication is not an absolute defense to civil suit).

To sanction the ordinance or the inapplicability of the exclusionary rule in this case would be a "green light" to law enforcement officers that even the deterrence rationale for the exclusionary rule has been obliterated.

E. A Wrong Without Redress: There Are No Existing Alternatives to the Exclusionary Rule. [6]

Under the aegis of this Detroit Ordinance, police officers may violate

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6 A general discussion of the alternatives to the rule may be found in Sevilla, "The Exclusionary Rule and Police Perjury" 11 San Diego L.R. 839, 845-859 (1974).

with impunity both the letter and spirit of the Fourth Amendment. Criminal sanctions exist on paper (18 U.S.C. 241: conspiracy against the rights of citizens and 18 U.S.C. 242: deprivation of rights under color of law) to deter such misconduct but seldom are such prosecutions initiated. When they are, as in the case of the infamous Collinsville, Illinois, drug raids, rarely are these prosecutions successful. Dean Wigmore in his Treatise on Evidence suggested the use of criminal contempt. [7] The defendant convicted of the offense goes to prison, but the officer who violated the Constitution by an unlawful search is sent to jail. Prosecutors filing such criminal actions, by statute or by

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7 "The natural way to do justice here would be to enforce the healthy principle of the Fourth Amendment directly, i.e., by sending for the high-handed, overzealous marshal who had searched without a warrant, imposing a thirty day imprisonment for his contempt of the Constitution, and then proceeding to affirm the sentence of the convicted criminal."
8 Wigmore, Evidence, Section 2184 (3d ed. 1940).

contempt, would immediately alienate the law enforcement officers with whom they must regularly work. That is why they are not commenced. [8] Internal discipline

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8 One group of researchers could find no reported prosecutions for police misconduct between 1956 and 1969:

> We have been unable to unearth any additional reported cases for the subsequent 13 years. No authoritative explanation has been given for the absence of prosecution for police offenses, but the reasons are not difficult to surmise. Prosecutors are probably reluctant to enforce these dormant criminal sanctions against police offenses because they anticipate, in our view correctly, a detrimental effect on law enforcement which is the goal of both departments, and because they consider the punishment too harsh.

LAW AND ORDER RECONSIDERED, REPORT OF THE TASK FORCE ON LAW AND LAW ENFORCEMENT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, 382 (1969). As of 1960, less than half the States had punitive sanctions against police invasions of the right to privacy. Mapp v. Ohio, 367 U.S. 643, 652 n.7 (1961).

by the police agency itself is unrealistic and non-productive, for these covert administrative proceedings will be more concerned with the protection of the officer than with the person offended by the alleged misconduct. The recent turmoil within the Federal Bureau of Investigation concerning alleged illicit searches carried out pursuant to high level authorization has not yet been resolved, but few disciplinary actions have been taken. [9]

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9 The Attorney General has now proposed legislation that would grant absolute immunity to federal officers but, in exchange, would create an open disciplinary proceeding in which the parties aggrieved would participate.

Much of the problem of police privacy violations could be alleviated with better internal police review. However, most "(c)ommentators believe that internal police disciplinary actions are incapable of dealing with police violation of constitutional guarantees." Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives, 2 J. of Legal Studies, 243, 277 (1973). This conclusion derives from a reluctance of old-line police chiefs to obey the courts' strictures in the Fourth Amendment area. Dr. Egon Bittner quotes several former big city police administrators who condoned law-

As an alternative to the exclusionary rule in criminal cases, some have suggested a substitute civil action against the government with a maximum limitation on recovery; however, existing law permits such civil actions in addition to the exclusionary rule. A civil rights action against state offi-

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less conduct by police officers in order to achieve desired ends.

> Thus, Superintendent Wilson of Chicago declared, "If we follow some of our court decisions literally, the public would be demanding my removal as Superintendent of Police and--I might add--with justification.' Chief Parker of Los Angeles has taken the view that, 'It is anticipated that the police will ignore these legal limitations when the immediate public welfare appears to demand police lawlessness.' And Chief Schrotel of Cincinnati has stated the dilemma of the policeman in these terms: 'Either he abides by the prescribed rules and renders ineffective service, or he violates or circumvents the rules and performs the service required of him.'

E. BITTNER, THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY, 28-29, n.45 (1973).

cers exists under 42 U.S.C. 1983 (See Monroe v. Pape, 365 U.S. 167 (1961), and since 1971 a money damages action may be brought against a federal officer for violation of the Fourth Amendment. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). The initiation of a federal civil action entails many relative expenses, the principal cost of which is legal fees. [10] The inherent costs are an overwhelming deterrent to such litigation. Practicing lawyers experienced in litigation of this nature know that the attainment of compensatory damages, let alone the cost of litigation, are illusory. On the merits of the case, the plaintiff must overcome the legal obstacle of the "good faith" defense.

In Norton v. United States, 581 F.2d 390 (4th Cir. 1978), cert. denied, ___ U.S. ___; 47 U.S.L.W. 3391, (5 December 1978), an action was brought by a person whose apartment was forcibly entered without a search warrant by officers with drawn guns. The action was filed against state officers (42U.S.C. 1983) and federal officers (Bivens) as well as the United States under the 1974 amendment to the Federal Tort Claims Act (28 U.S.C. 2680 (h)). The court of appeals noted that

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10 Defense of such suits is also costly, for in many cases where a federal agent and the government are sued, the Department of Justice pays for the agent's separate attorney. At $60/hour these legal fees have amounted to $100,000.

in civil actions against the individual state or federal officers, they had a defense if they acted in good faith with a reasonable belief of the lawfulness of their conduct. 581 F.2d 390, 393 n.2. The Court also found that the defense was also available to the United States. The "good faith" defense has swallowed whole potential civil actions against officers for Fourth Amendment violations. This defense must not be extended to the already now severely restricted exclusionary rule for criminal cases. Only the affluent and powerful are able to commence and maintain such civil actions, but the poor and powerless are incapable of pursuing such civil remedies against wealthy and resourceful government agencies defending the actions of the officers. The criminal case admittedly is a limited form to provide redress for those subject to illegal police searches, but something is better than nothing. The instant criminal action was the vehicle for the successful challenge of the impermissible and unconstitutional ordinance.[11]

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11 As Professor Dallin Oakes states: "The advantage of the exclusionary rule--entirely apart from any direct deterrent effect--is that it provides an occasion for judicial review (of alleged violations of constitutional rights) and it gives credibility to the constitutional guarantees." Oakes, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665, 756 (1970)

The exclusionary rule has the additional advantage of minimizing litigation. To attain civil redress, an additional suit must be filed in over-worked courts. The efficient and therapeutic aspect of the exclusionary rule is that it vindicates the right of a person aggrieved and at the same time constitutes only a mild censure of the law enforcement misconduct. If anything, the exclusion of evidence is an appeal to the professionalism of the police to do a better job in the future. It contains no sanctions other than a moral exhortation for compliance with the ideals expressed by the Fourth Amendment. [12]

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12 The exlusionary rule has played an important role in initiating and maintaining police training of search law in the more advanced departments. See, e.g., Wilson & Alprin, Controlling Police Conduct: Alternatives to the Exclusionary Rule, 36 LAW & CONTEMP. PROB. 488, 498-99 (1971).

To continually erode the Fourth Amendment exclusionary rule in criminal cases without a viable, readily accessible and effective alternative [13] is to foster a serious misconception that some recourse exists for wrongs committed by law enforcement officers. Already, authority exists for initiating civil suits against individual officers as well as government agencies, but few such suits are filed. This is not

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13 In fact, discussion of alternatives to the exclusionary rule is deceptive. "Their statement conveys the impression that one possibility is as effective as the next. For there is but one alternative to the rule of exclusion. That is no sanction at all . . . ." Wolf v. Colorado, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting). Former Chief Justice Traynor of the California Supreme Court in People v. Cahan, 44 Cal. 2d 434, 447 (1955), stated the problem in similar terms: "Experience has demonstrated, however, that neither administrative, criminal, nor civil remedies are effective in suppressing lawless searches and seizures . . . ."

because of few grievances. The civil mechanisms to provide relief simply do not work. [14] To refer to dysfunctioning remedies as alternatives is less than honest.

Until civil suits are prosecuted against the offending officers and their agencies with diligence and ardor and

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14 In Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966), the police had conducted over 300 searches of homes over a 19-day period without warrants and based upon anonymous tips. An injunction was granted, the circuit court holding:

> There can be little doubt that actions for money damages would not suffice to repair the injury suffered by the victims of police searches. . . .(T)he wrongs inflicted are not readily measurable in terms of dollars and cents. Indeed, the Supreme Court itself has already declared that the prospect of pecuniary redress for the harm suffered is 'worthless and futile'. Moreover, the lesson of experience is that the remote possibility of money damages serves as no deterrent to future police invasions. Id. at 202. See also URBAN POLICE FUNCTION, Section 5.3, at 152.

with counsel appointed to pursue such actions much in the fashion that counsel is appointed under the Criminal Justice Act (18 U.S.C. 3006A), for those financially unable to retain counsel, legal remedies will be little more than hollow words. The creation of meaningful civil remedies may be far more punitive on law enforcement than the now modest impact of the exclusionary rule in criminal cases. Today, redress in civil courts for a violation of the Fourth Amendment is a rare occurrence. Wrongs proliferate, but redress shrinks. Further erosion will make the Fourth Amendment nothing more than an unkept promise of privacy and protection from government excess. [15]

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15 The right of privacy, the "most comprehensive of rights and the right most valued by civilized men," Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting) is a right so precious that it would be foolish to abruptly abandon the predominant remedy for its violation and rely on ineffectual alternatives. Many of the exclusionary rule's opponents recognize this and conclude that the rule should not be abandoned in the absence of a realistic alternative remedy for conduct violating the Fourth Amendment.

CONCLUSION

For the foregoing reasons, as well as those contained in respondent's brief, amici respectfully submit that this Court should affirm the decision of the Michigan Court of Appeals.

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